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File No. O. Local Boards 149.

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Legal **DEPARTMENT**

A **BRANCH**

Subject:—

Opinions under the Bombay Local Boards Act 1923

PWDE

File No. O · Local Boards /41

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84 A

CONTENTS

Legal Department File No.. Local Boards/41.

Sr. No.	Compilation No.	Subject	Pages.
		Bombay Local Boards Act. 1923.	
1.	U. R.to the Advocate General.No.29. Confl. dated 17th Jan 1941. Advocate General's Opinion dated 22-1-41 U.R. to G.D.No.39-Confl. dated the 24th January1941.	Whether the President, D.L.B, DWR, is removable by the Provincial Govt.from his Office under S. 26(1) of- in view of his detention under Rule 129, Def. of Ind. Rules, Whether he becomes "Incapable of acting" within the meaning of S.26(2) of	1 - 11
2	U.R.to G.D.No.68. Confl. dated the 11th Feb.1941.	Whether it is competent for D.L.B. to delegate its powers for the purposes of the B. Village Panchayats Act, 1933.	13- 15
3	U.R.to G.D. No.1936 dated the 5th March 1941.	S.38. Appoint of Taluka Committee under- by a D.L.B. whether ultra vires the S.38 A.	17 -20
	U.R. to G.D.No.3712 dated the 26th April 1941.	Whether the Engineer of a D.L.B. can accept and sanction piece work tenders	21 -22
	R. to G.D.No.4765 ed the 24th May 1941.	Liability of the D.L.B., Surat, for contributing towards pension payable to the vaccinator for the period his services were lent to it by Government.	23 -25
	D.No.5175 9th June 1941.	S.93(1)(a). Whether the Administrator of the superseded D.L.B.has power to apply to Govt. to levy the L.F.C. at the enhanced rate.	27 -28.
	.4892. h May 1941.	S.42(2) . Water supply scheme, Uran and Kharapat villages. Whether Resolution of the D.L.B. Kolaba regarding its contribution towards the Scheme amounts to a valid contract between Board and Govt.	29 -31.
	O. 1e 1941.	D.L.B. Ratnagiri Whether can be compelled to share expense of the Sir D.M.Petit Leper Asylum, in view of its resolution accepting condition (4) Para. 1. of G.R.G.D. No.462. dated 23-1-1906.	33 -35.

9)	U.R. to G.D.No.5472 dated 19th June1941.	Jurisdiction of a Civil Court to pass a decree declaring that plaintiffs, and not the defendants, are validly elected to the D.L.B.	37 -41.
10)	U.R.to R.D.No.6017 dated the11th July1941.	Ss. 93&94 Recovery of increased L.F.C.during the period of renewal of lease of villages Sadra and Kharoli in Godhra Taluka granted to the Thakore of Janod.	43 -45.
11)	U.R.to G.D.No.6874. dated the 5th August 1941.	Ss. 50(e) & 121(1) Recovery of expenditure from D.L.B.incurred by Govt. for the purpose of anti-plage measures.	47.
12)	U.R.to the Advocate General, Bombay, No.7368, dated the 21st August1941. Advocate General's opinion dated the 14th Sept-ember,1941. U.R.to G.D.No.8376. dated the 24th Sept.1941.	S.93(1)(a) Whether the Administrator of a suspor-seded D.L.B. is competent to exercise its powers under-	49 -57.
13)	U.R.to G.D.No.8528 dated the 29th Sept.1941	Resuming Propetery rights in the building landed over to the D.L.B., Ratnagiri.	59.
14)	U.R. to G.D.No.10347. dated the 2nd Decem.1941	S.126(1) Powers of the Collector to provide for the execution of the work etc. and to direct to immediate payment of expenses of executing the same by the D.L.B.	61
15)	U.R.to G.D.No.5618 dated the 25th June 1941.	S.133(h) .Power of the D.L.B. to change its headquarters in the interest of its administration	63.

DYR.

Statement of the Case for the opinion of the Advocate General.

1. In his letter No.C.F.L.S,dated 22nd December 1940, the Collector of Dharwar states that Mr. V.V.Patil,President of the District Local Board, Dharwar, who was arrested on 13th December 1940 under rule 129 of the Defence of India Rules, is now to be transferred to the Belgaum Central Prison. The President has not till now applied for leave not has he delegated his powers to the Vice-President. The Collector of Dharwar is of opinion that in view of the Government order detaining him in jail indefinitely, the President(Mr.Patil) " has become incapable to perform his duty as President" and consequently he is removable by the Provincial Government from his office as such President under section 26(1) of the Bombay Local Boards Act, 1923.

2. Section 26(1) of the Bombay Local Boards Act, 1923, empowers the Provincial Government to remove a President or Vice-President for misconduct or neglect of or incapacity to perform his duty. The reasons for removal from office of a President or Vice-President should, therefore, be such as are connected with the performance of the duties attached to the office of the President or Vice-President. If Government is satisfied that as a matter of fact there is a reasonably apparent neglect in the discharge of his duty on the part of a President

or Vice -President or that such President or Vice -President has become incapable of performing his duty, it will, it seems, be immaterial whether such neglect or incapacity to perform his duty is voluntary or involuntary i.e. is due to any perversity or to some physical or mental defect or to any political or other action on the part of the President or Vice-President concerned and the powers of Government of removal under section 26(1) will not, it appears, be in any way diminished merely because the resulting neglect of or incapacity to perform the duty of the office of President is involuntary so far as the particular President or Vice-President is concerned. The view taken by the General Department office that the term " neglect of duty " would mean voluntary refusal or omission of any work without-sufficient reason does not appear to be quite correct, for "neglect of duty" may result even when the party responsible is not really negligent but is merely unable to attend to the relevant duty for valid and sufficdent reason or due to circumstances beyond such party's control.

3. In the case of a President, leave of absence is required only if the period of absence exceeds three months and even then only in the circumstance specified in section 25. It is doubtful whether mere indefinite detention in the special jail at Belgaum as in this case will justify Mr. Patil's removal from office as President for neglect of or incapacity to perform his duty withing the meaning of section of 26(1)

of the Bombay Local Boards Act, 1923. The view that non-performance of duty resulting from detention in jail would involve or may be itself amount to neglect of or incapacity to perform his duty as president, though it may be strictly correct, is likely to be looked upon as too technical and it does not appear that Government should, though probably it can, resort to section 26(1) of the Bombay Local Boards Act, 1923, in a case like the present one where there is no inherent incapacity to perform the duties.

4. he Advocate General is requested to be so good as to give his opinion on the following questions:-

(1) Whether in the circumstances reported by the Collector of Dharwar at page 1 ante, Mr. Patil can be removed by the Provincial Government from his office as President under section 26(1) of the Bombay Local Boards Act, 1923,

(2) If not, whether he can be said to have become " incapable of acting" withing the meaning of section 26(2), and if so, whether the vacancy can be filled up by election of another member thereto.

Id/-

Remembrancer of Legal Affairs.

U.R.to the Advocate General, Bombay No. 29 Confl., dated the 17th January 1941.

My answer to both the questions is in the negative.

2. The first question is whether on the facts stated there is misconduct or neglect of or incapacity to perform his duty within the meaning of section 26(1). It is clear that the facts stated do not amount to misconduct or neglect of duty. Do they constitute " incapacity to perform his duty"? The incapacity referred to in the sub section means, I think, want of capacity, i.e. want of power or ability or faculty for the duties in question. The incapacity must, I think,arise by reason of something lacking in the person concerned, e.g. it may be mental incapacity or physical incapacity or even legal incapacity. It has been held that incapacity in the case of trustees means personal incapacity. (Re: Bignold, L.R. 7 Ch.223). The incapacity mentioned follows the words " misconduct" and " neglect" which can only be personal and this context strengthens the view that the incapacity contemplated is personal. It is clear, therefore, that the facts mentioned do not constitute incapacity within the meaning of section 26(1).

3. The further question that arises is whether the facts stated amount to his "becoming incapable of acting" within the meaning of section 26(2). At first sight and having regaard to the difference in the language of the two sub sections it would appear as if these words were more comprehensive than the words "incapacity to perform his duty" in sub section (1). When however one compares these sub sections with sections 31 and 33 of the Act, which are the corrsponding provisions in the case of a member, it seems that the words " incapacity to perform his duty" and " becoming incapable of acting " are used in the same sense. In section 31 the Legislature has, instead of "incapacity to perform his duty", used the expression " has become incapable of performing his duties". It would seem, therefore, that there is no distinction between an incapacity to perform his duty and his becoming incapable of acting and that in both the cases there

must be personal incapacity in the sense above mentioned .

Id/-

Advocate General

22-1-41.

A copy of the opinion of the Advocate General, who was consulted in the matter, together with the Statement of the Case, is appended.

Id/-
Remembrancer of Legal Affairs.

U.R. to G.D. , No.39 - Confl., dated the 24th January 1941.

Office of the B.L.A.

The Bombay District Local Boards Act, 1923 and the Bombay Village Panchayats Act, 1933 are two differenct encatments and the powers and duties of a district local baoard under each are also different. The powers to be exercised and the duties to be performed by the District Local Board Committee appointed in respect of any purpose under section 38(1) of the Bombay Local Boards Act. 1923 would be those of the District Local Board under that Act and not under any other Act. The Bombay Village Panchayats Act, 1933 clearly does not contemplate the delegation of powers by the District Local Board or even by the Provincial Government except where specifically provided for in the Act itself as in sections 94, 95 and 112. The last named section provides that the Provincial Government may by notification authorise the Commissioner or any officer to exercise in respect of panchayats any of the powers which may be exercised by the Provincial Government under this Act except the powers in respect of the village benches under Chapter VI. It will thus be seen that even the Provincial Government's powers of delegation are to an extent circumscribed by the Act. A similar delegation of powers has not been provided for in the Act in respect of the District Local Board and accordingly it would not be competent for the District Local Board to delegate its powers for the purpose of the Bombay Village Panchayats Act, 1933 to a committee appointed under the provisions of the Bombay Local Boards Act, 1923. Unless the Statute expressly authorises delegation the Corporation itself must exercise the powers conferred upon it by statute (See Aiyangar's Law of Municipal Corporation, P. 28). Consequently the appointment of a committee by the District

Local Board, Broach, under section 38(1) of the Bombay District Local Boards Act to exercise its powers and perform its duties under the Bombay Village Panchayats Act is clearly illegal. The view taken by the Examiner, Local Funds Account, Bombay, is correct.

Id/- ----

Remembrancer of Legal Affairs.

U.R. to G.D.,No.68 Confl., dated 11th February 1941.

Submitted.

In his letter dated 8.4.40 Mr. Nhanesaheb Ahmedsaheb, a member of the District Local Board, Ratnagiri, informed the Commr. S.D. that after the taluka local boards were abolished under section 38A (1) of the Bombay Local Boards Act, 1923, under sub-section(2) it was open to the Provincial Govt. on an application made by the D.L.B. or otherwise, to direct that taluka Committees should be appointed from a date to be specified in the notification for the areas which were subject to the authority of such taluka local boards. However, in the present case, the D.L.B. Ratnagiri by its resolution No.11, dated 3.3.40(not on record) appointed taluka committees. It appears that another resolution was passed by the D.L.B. on 27.3.40 assigning indefinite powers to the said Committees . His contention was that the appointment of such taluka Committees is ultra vires section 38A of the Bombay Local Boards Act, 1923. In his letter No.L.F.H. 124, dated 16.7.1940 the Commr. concurred with Nhanesaheb that the appointment of taluka Committees by the D.L.B. Ratnagiri, was ultra vies. However, subsequently, in pursuance of Govt. Memo. No.1248/33/C, dated 19.5.39, the Commr. informed that the Collr. of Ratnagiri and the petitioner that

P.7 ante.

P.9 ante.

P.11 Do.

contd.

his letter dated 16.7.40 should be treated as cancelled. Mr. Nhanesaheb has now represented the matter to A(R) stating that the aluka Committees are appointed under section 38A(2) of the Bombay Local Boards Act 1923, without the sanction of Govt. Pp.. 1-ante.

2. In Para.2 of the G.D.office note dated 17.1.41, it is stated that from the Commr's remarks it appears that the D.L.B. Ratnagiri has formed executive Committees under section 38(1) and not taluka Committees under section 38A of the Bombay Local Boards Act,1923. The letter of the Commr. S.D. No.L.F.R. 124, dated 8.12.40, however, does not support this inference drawn by the G.D.office. The Commr. remarks thus:- Pp. 21- 22 ante. Pp. 19- 20 ante.

"When I first received Mr. Nhanesaheb's letter of 2nd April 1940 and 8th May 1940, I thought there was no doubt that sections 38 and 38A of the Local Boards Act read together prohibited a district local board from forming taluka Committees except in accordance with the procedure of section 38A and informed his and the local board accordingly in my letter No.L.F.R. 124, dated 16.7.40. Shortly afterwards, I obtained from the Examiner, L.F.A. a copy of Govt. Memo. G.D. 1248/33/C, dated 19.5.39 with a copy of R.L.A's opinion No.4972, dated 4.5.39, from which it appears that the enactment of section 38A does not take away the power of a district local board of appointing taluka Committees under section 38". The words underlined do not correctly explain the legal position as stated in R.L.A's opinion No.4972, dated 4.5.1939. In the said opinion R.L.A. advised

that "the enactment of section 38A does not take away the power of a district local board to appoint an executive Committee under section 38". Section 38A specially provides for appointment of taluka Committees and this section read with section 38 implies that taluka Committees can be constituted only under and in accordance with the provisions of section 38A and not under Section 38. The maxim "generalise clausular non porrigitur,Aidca quae antea specialiter sun comprehensa" (a general clause does not extend to those thing which are specially provided for) would apply. If,therefore, the D.L.B. Ratnagiri, has in fact appointed taluka Committees, they would be ultra vires section 38A and cannot be constituted in the absence of a direction from Govt for appointment of taluka Committees under Section 38A(2) and rules made under section 133(Cc) of the Act (Govt. has not made any notes under Section 133(Cc)

The constitution, powers and duties of (executive) committees appointed under sec. 38 and those a taluka Committee appointed under sec. 38A of the Bombay Local Boards Act, 1923 are differenct. There is nothing to prevent a district local board from constituting an executive committee for each taulka under Sec.38 (cf.R.L.A's opinion No.4972, dated 4-5-39) . Consequently if the Taluka Committees constituted by the Ratnagiri District Local Board in the present case fall under sec. 38, they are in the

nature of executive committees and are therefore leagal inspite of their being called Taluka Committees; but if these committees are constituted under sec. 38A they would be ultra vires for want of a notification under sub-sec.(2) of that section.

The view taken in G.D. office note at pp.21-22 ante is correct and the papers may be seen and returned B.A.

Office of the R.L.A.

U.R. to G.D. No.1936 dated the 5th March 1941.

Office of the H.L.A.

The question for consideration of the Remembrancer of Legal Affairs is whether the Engineer of a District Local Board can accept and sanction piece work tenders.

2. There is no provision either under the Bombay Local Boards Act,1923 or the Rule thereunder empowering the Engineer of a District local Board to enter into contracts of any nature on behalf of the Board. Rule 131 of the Bombay Local Board Account Code, 1935 provides for power of the Engineer to invite tenders. The Form No.45 referred to in rule 129 does not say by whom the tender is to be accepted. The mere calling for tenders does not amount to any contract. It is only when a tender is accepted that a contract comes into existence. Consequently although the Engineer of a District Local Board can invite tenders, it would not be competent for him to accept them on behalf of the local Board.

3 Section 42(1) of the Bombay Local Boards Act, 1923 enacts that the President of a Local Board may on behalf of the Board enter into any contract or agreement the value of which does not exceed Rs.500. Under rule 1(b) (iv) of the Rule framed by Government in 1924 in exercise of powers conferred by section 133(c) of the Bombay Local Boards Act, 1923, the power to enter into contracts, the amount or value of which exceeds Rs.2,500 shall be exercised by Local Boards alone while under the provision to that rule the power to enter into contracts may be delegated by the Board to (1) the Standing Committee of the Board as regards contracts the amount or value of which exceeds Rs.500 but does not exceed Rs.2,500, and (2) the President of the Board as regards contracts the amount or value of which does not exceed Rs.500. Consequently although under section 42(1)

of the Act the President can on behalf of the Board enter into any contract or agreement the value of which does not exceed Rs.500 he would not, on his own responsibility as President, be competent to enter into such contracts unless the power to do so has been delegated to him under proviso (a) (2) to rule 1 of the Rules.

Id:- 25/4.

Remembrancer of Legal Affairs.

U.R. to G.D.No.3712, dated the 26th April 1941.

(23)

Submitted.

Please see G.D.o.n. at pp.9-12 ante. Both the Surat Municipality and the D.L.B. Surat, have refused to pay their respective contributions towards the pension of the vaccinator Kashinath Keshavrao. The Director of P.H. was therefore directed by G.D.to call upon the Surat Muny. to make contributions towards his pension within 3 months and to inform the Muny. that if it failed to do so, Government would be constrained to take action under sec.218 of the Bombay Munl. Boroughs Act, 1925. Similar action was taken in the case of vaccinator Pandurang Krishna (Please see R.L.A's No.7277, dated 17th July 1939 and also p.9 ante). The Muny. has not so far replied to the D.P.H's letter. The G.D. is of the view that similar action can also be taken against the D.L.B., Surat, for non-payment of its share of the contribution. The quesion for consideration of the R.L.A. is whether the D.L.B. would be liable to contribute to the pension payable to the vaccinatior for the period his services were lent to it by Govt. and if it refuses to pay its share, whether action can be taken under sec. 127 of the Bom. Local Boards Act, 1923.

2. Under section 50(e) of the Bombay Local Boards Act, 1923, it is an obligatory duty of a local board to make an adequate provision for public vaccination and to pay for such staff. It appears that Kashinath Keshavrao was a vaccinator in the

service of Govt. and that his services were lent to the District Local Board, Surat. Proviso (1) to sec. 123(g) of the Bombay Local Boards Act,1923, provides that if an officer is lent to any local board by the Provl. Govt. or if an officer is employed partly in the services of the Provl.Govt. and partly in the services of a local board, such board shall contribute to his pension and leave allowances to such extent as may be required by rules made by the Provincial Government in this behalf under clause (g) of sec.133. Rule 5 of the rules made by the Provincial Government under clause (g) of section 133, inferalia provides that the pension of Government servants employed by local boards will be according to such scale as may be prescribed by Government from time to time in the case of transfers to froeign service. Presumably Government has prescribed such scales, providing, also the extent to which the local board wants the liable to contribute to the pension. If so it would be obligatory on the board to pay contributions to the pension of a Government servant lent to it according to the scale prescribed by Govt. (vide R.L.A.'s opinion No.7277 dated 17th July 1939) . The Local Board is therefore under a duty, imposed by the provisions of the Act, to contribute towards the pension of the vaccinator lent by Government in accordance with the scale prescribed. In the event of its default therein, action can be taken under section 127 of the Bombay District Local Boards Act, 1923. (Vide R.L.A.'s opinions No.2803 dated the 20th May 1932 and No. O. Dist. Pol. 4/30, dated the 20th November 1930). The view taken by G.D. in its office note, at

at pp. 11-12 ante, appears to be correct

Sd/-21/5

U.R. to G.D.No.4765 dated the 24th May 1941.

Submitted.

Under section 93(1)(a) of the Bombay Local Boards Act, 1923, Government levied the local fund cess for the Dist. Local Board, Nasik at the rate of one anna and three pies. The D.L.B., Nasik has been superseded for a period of three years and Khan Saheb N.R.Kazi has been appointed under section 131 of the Act to exercise and perform all the powers and duties of the Local Board during the period of supersession. In his letter dated 1-4-41, the Administrator requests the Collector to move the Commissioner and the Government to levy cess in the District at the rate of two annas on every rupee of land revenue payable to Government with effect from the next revenue year commencing from 1-8-41. The question for the R.L.A's consideration is whether under section 93(1)(a) of the Bombay Local Boards Act. 1923, the Administrator of the superseded District Local Board, Nasik, is entitled to apply to the Government for levy of the increased cess at the rate to two annas in the rupee and if so, whether the orders proposed are in order from legal point of view.

2. A District Local Board is a body corporate with perpetual sucession (section 47 of the Bombay Local Boards Act, 1923). It never ceases to exist except when the District for which it is constituted is abolished by a legislative enactment. Even when it is superseded it does not cease to exist. The only effect of supersession

under section 129 of the Act is that all members of the Board have to vacate their offices as such members from the date of the order. Under section 131 of the Act, when a local board is superseded, all powers and duties of the board may during the period of supersession, be exercised and performed by the person appointed by the Provincial Government. By G.R.G.D.No.4329/33, dated 20-3-41 , the Dist. Local Board, Nasik, has been superseded for a period of three years and K.S.Kazi has been appointed to exercise all powers and perform all the duties of the D.L.B.. It is, therefore, clear that under section 93(1) (a) of the Act, the Administrator has the power to apply to Government to levy the local fund cess at the enhanced rate of two annas in the Rupee(see R.L.A's opinion No.4632. dated 21-5-1941). As the cess is levied by Government for the D.L.B.Government may act upon the application of the Administrator and levy the cess at two annas in rupee. The view taken in para. 5 of the G.D. office note, dated 13-5-41 is correct

3. The draft G.R. at pp.13-14 ante as slightly amended in order.

Sd/-
26/5.

It appears that a scheme for provision of water supply to Uran and the Kharapt villages was prepared by Government. The scheme was to cost Rs.5,00,000 and the Kolaba District Local Board promised a contribution of Rs.25,000 towards its capital cost. That scheme was however abandonded and a less costly scheme finally adopted, wherefor it was not necessary for Government to utilise the Board's contribution towards its capital cost. The works were to be maintained by Government, and the Board by its resolution, dated 8th July 1924, printed in the preamble to G.R., P.W.D., No.1, dated the 30th December 1924(Slip T), promised to contribute towards the cost of mainenance and repairs. The resolution runs as follows:-

" Resolved unanimously that Government should receive Rs.1,000 on account of interest on the Board's contribution of Rs.25,000, - Rs 100 on account of Board's promise of a further grant, Rs.1,000 as grant from Salt Department along with an estimate of Rs.1,000 to Rs.1,500 to be levied by a water- tax., by the Board and should enturst the water-works to the Public Works Department or any other department for maintenance, etc. "

It is clear from the wording of the resolution that the Board undertook to conritbute a minimum sum of Rs.2,100. part of which it porposed to raise by levying a water-tax. But the resolution of the Board and the orders contained in the said Government Resolution do not amount to a valid contract between the Board and Government. Section (42)2 of the Bombay District Local Boards Act, 1923, lays down the formalities for the execution for a contract by and on behalf of the Local Board; and Section 42(3) provides that no contract not so executed is binding on a Local Board. If there is no contract, in this case, executed in the manner prescribed, there will exist no valid contract enforceable in law against the Kolaba District Local Board. (Ahmedabad Municipality Vs. Sulemanji, I.L.R. 27

Bom.618; Raman Chetty Vs. Municipal Council of Kumbhakonam, I.L.R. 30 Mad. 290; Secretary of State Vs. Sarin, I.L.R. 11 Lah 375). But section 65 of the Contract Act provides that when an agreement is discovered to be void, any person who has received any advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he received it. Under section 70 of the Contract Act, when a person, lawfully does anything for another person, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of the thing so done. Consequently the Board is bound to make compensation to Government in respect of the repairs and maintenance of the water- works which Governemtn has already done, but the Board would be under no liability to pay the stipulated sum of Rs.2100/- per year in respect of maintenance charges in future unless it executes a formal contract with Government in accordance with section 42 of the Bombay Local Boards Act,1923, and section 175(3) of the Government of India Act, 1935.

Id/- --- 27/5.

Remembrancer of Legal Affairs.

U.R. to G.D. No.4892 dated the 28th May 1941.

The question raised for consideration is whether in view of condition (4) mentioned in paragraph 1 of Government Resolution, General Department No. 462, dated the 23rd January 1906, which the District Local Board, Ratnagiri, accepted by a resolution, the District Local Board can be ~~compelled~~ compelled to share in the expenses of the Sir D.M.Petit Leper Asylum, Ratnagiri. The history of the institution is stated fully in R.L.A's opinion No.9069 dated the 15th October, 1940, and it was pointed out therein that the primary responsibility for maintenance of the institution rests upon Government. It is ture that in Para. 1(4) of Government Resolution, General Department No.462, dated the 23rd January 1906, it was laid down, as one of the conditions on which Government expressed its willingness to hand over the management of the institution to the Board, that no condition limiting the District Local Boards share of the expenses of the institution can be agreed to. And by its resolution No.2 dated the 16th February 1906, the Board accepted the same. But this was done only to emphasise that during the Board's management, the institution will be treated as a grant-in- aid dispensary only, and does not affect the ultimate responsibility of Government to maintain the institution which arises by virtue of its acceptance of the donation from SIR. D.M.Petit. Morevover it does not appear that a contract in writing embodying the conditions was made and executed complying with the formalities prescribed by section 35 of the Bombay District Local Boards Act, 1884, which was then in force. Consequently the contract would not be legally enforceably against the Board (See R.L.A's opinion No.4892, dated the 28th May 1941) and the Board cannot be compelled under its resolution 2 dated the 16th February 1906, to share the expenses of the institution. The Board has however passed a fresh resolution undertaking to give a grant of Rs.2,000/-

on Government taking over the management of the institution (See Page 163). The Board may be asked to pass a valid document for this purpose so as to make itself liable legally (so far as the local fund at the Board's disposal will allow) for the regular payment of this amount.

Id/-- 13/6.

Remembrancer of Legal Affairs.

U.R. to G.D. No.5380, dated the 16th June 1941.

At the general election to the Dharwar Local Board held on the 17th December 1938, there were four candidates for election to the two seats for the Non-Muslim Southern Constituency, Hirekerur taluka, Messrs. Tambakad, Kulkarni, Patil and Hullatti. The two first named appear to have objected to the acceptance of the nomination papers of the last two, but the Returning Officer overruled the objection. Messrs. Patil and Hullatti having secured the highest number of votes were declared to have been elected and their names were published in the Government Gazette under section 22 of the Bombay District Local Boards Act, 1923. Messrs. Tambakad and Hirekerur filed a civil suit on 12th November 1938 in the Court of the II Class Sub-Judge, Haveri, against Messrs. Patil and Hullatti for a declaration that they are the elected members of the Local Board, on the ground that the defendants were not qualified to vote and to stand for the election. They also filed an election petition under section 19 of the Bombay District Local Boards Act, 1923, but the Assistant Judge held that the petition did not lie. In the civil suit, however, the Court held that the defendants were not qualified to vote and granted plaintiffs a decree declaring that they are validly elected members of the Local Board. They now request the Collector to issue a notification under section 22 of the Bombay District Local Boards Act accordingly.

2. The first question which arises upon these facts is whether the decree of the Court in so far as it declares that the plaintiffs are validly elected members and that the defendants are not such members of the Local Board is lawful. Section 9 of the Code of Civil Procedure, 1908, provides interalia that the Court shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is expressly or impliedly barred. The right to sit as a member of the local Board is not an ordinary civil right but is created by the Bombay District Local Boards Act, 1923, wherein provision is made for inquiry and adjudi-

cation of disputes relating to elections. Now when an Act names a special tribunal to determine questions as to rights created by that Act, then except as otherwise expressly provided or necessarily implied, that Tribunal's jurisdiction to determine these questions is exclusive (I.L.R.31 Bom. 604). The Judge, under section 19 of the District Local Boards Act, 1923, is empowered to hold inquiries into disputes wherein the validity or any election of a member is challenged, to set aside his election and to declare validly elected any person who secures the highest number of votes. His jurisdiction is not limited, as held by the Assistant Judge, to cases wherein allegations have been made of corrupt practice, etc., but extends also to cases where the validity of any election of a member is challenged on the ground that he was not qualified to vote (see R.L.A's opinion No.7854, dated the 3rd August 1939). Consequently the Civil Court has no jurisdiction to pass a decree declaring any person to be elected or that the election of any other person is not valid.

3. In the present case the Assistant Judge who had jurisdiction has declined jurisdiction. And as he is a persona designata, his decision is not subject to the appellate or revisional jurisdiction of the High Court. Nor would a petition for a writ of certiorari lie because this is not a case where the Judge has exceeded his jurisdiction (cf.Mulji Sicka & Co.vs. Municipal Commissioner of Bombay, 41 Bom. L.R. 974). The Civil Court's decree in so far as it declares that the plaintiffs, and not the defendants, are validly elected members of the local board is without jurisdiction and cannot be acted upon. Thus, though the applicants have done all they could, they have failed to obtain a valid order setting aside the election of the defendants and declaring them to be validly elected members. The result doubtless is unfortunate, but the Collector cannot act on a part of the decree which is prima facie without jurisdiction

DYR.

and to that extent void.

4. I t is possible that if the Collector rejects the applicant's request they may file a suit against Government or the Collector. In that event, it would be possible to defend such suit, and the litigation would serve to obtain an authoritative decision of the High Court as to the scope of the inquiry under section 19.

Id/- ---

Remembrancer of Legal Affairs.

U.R. to G.D., No.5472, dated the 19th June 1941.

Submitted.

P. 19 ante.

By G.R.R.D. No. No.8241/33, dated the 18th August 1938, the lease granted to the Thakor of Janod in respect of the villages of Sadra and Kharoli in Godhra Taluka was renewed for 5 years from 1.8.36 on the terms approved in G.R.No.12227, dated 30th November 1908 subject to the modification that the Jama was increased to Rs.1050. The local fund cess of Rs.75 was fixed to be recovered from the said Thakore. The history of this levy of local fund cess from the Thakore is set out in para.1 of R.L.A's opinion No.4433, dated 6.5.40. Govt. then found that the assessment in respect of both the villages was Rs.2082- 10 - 6 and the question that was referred to the R;L.A. for consideration was whether the Thakore was liable to pay local fund cess on the amount of assessment of Rs.2082- 10- 6 under section 93 of the Bombay Local Boards Act. R.L.A. in his opinion No.4433, dated 6.5.40 advised that the Thakore could not be required to pay the local fund cess on the full amount of assessment under sections 93 and 94 of the Bombay Local Boards Act, 1923, and that the Jama of Rs.1050 payable by the Thakore was rent and could be regarded as ordinary land revenue. The local fund cess calculated at one anna per rupee under section 93 of Rs.1050 amounted to Rs.65-10-0. The R.L.A. was then again consulted on the point whether jama should be levied at Rs. 65-10-0 or Rs. Rs.75 as already fixed in G.R.No.12227, dated 30.11.1918. R.L.A.

P.163 of R.D.Vol. 390 of 1908

See the Collr's letter and the Commr's Memo in the preamble of G.R.R.D. No.8241/33, dated 3rd June1940 at P.45 ante.

Pp. 65-67 of File O.Local Bds/40.

advised in his opinion No. 7804, dated the 2nd September 1940 that the payment of Rs.75 in lump as local fund cess fully meets the statutory local fund dues and can be enforced as a term agreed upon at the renewal of the lease. The period of the lease would now expire on 31st July 1940 and the Commr. recommends renewal of the lease for a period of 5 years on the same terms and conditions as before. The R.L.A. is requested to state with reference to his opinion No 7804, dated 2nd September 1940 whether there is any objection to local fund cess of Rs.75 being recovered during the period of renewal.

P.125 of file O.Local Rds/40.

P.97 ante.

3. For the reasons stated in R.L.A's opinion No.7804, dated 2nd September 1940, there is no legal objection to local fund cess of Rs.75 being fixed during the period of the renewal.

Sd/-----
2/7.

A.S.

In his last opinion No.7804, dated the 2nd September 1940 the R.L.A. stated that the payment of Rs.75 in lump as a local fund cess would fully meet the statutory obligation, being not in defect of what was obligatory on Government to levy under section 93 of the Bombay Local Boards Act, 1923 and can be enforced as a term agreed upon at the renewal of the lease.

DYR.

Consequently if a similar term is incorporated in the new lease now to be taken from the Thakore there would be no legal objection to receovering Rs.75 as local fund cess from the Thakore. However, it is for Govt. to decide whether the Local Board to whom the local fund cess would ultimately go should be benefited by requiring the Thakore to pay more than what he is ordinarily liable to pay under section 93(a) of the Bombay Local Boards Act.

Id/- --

3/7.

As in para of mrs. Patnis note

A-A 9d/ 4/7 R.L.A. 9d/ 8/7

U.R. to R.D.No.6017 dated the 11th July 1941.

DYR.

It is true that it is one of the obligatory duties of a district local board to take anti-plague measures under secion 50(e) of the Bombay Local Boards Act, 1923;but the Collector passed no emergency order under section 126(1) in the present case and the expenses have been already incurred by Government for the purpose. Consequently it would not be legal for Government or the Collector to take stepts at this stage under section 126(2) to recover the expenses from the District Local Board.

2. The view taken by Deputy Secretary, G.D., at page 107 ante is correct.

Id/- --
Remembrancer of Legal Affairs.
31.7.41.

U.R. to G.D.,No.6874, dated the 5th August 1941.

Statement of the case for
Advocate General's opinion.

1. Under section 93(1)(a) of the Bombay Local Boards Act, 1923, Government levied the local fund cess for the District Local Board, Nasik, at the rate of one anna and three pies. The District Local Board, Nasik, has been superseded for a period of three years and Khan Saheb N.R.Kazi has been appointed under section 131 of the Act to exercise and perform all the powers and duties of the Local Board during the period of supersession (vide G.R., G.D.,No.4329/33, dated 20-3-1941, slip D). In his letter dated 1-4-1941, the Administrator requests the Collector to move the Commissioner and the Government to levy cess in the District at the rate of two annas on every rupee of land revenue payable to Government with effect from the next revenue year commencing from 1-8-1941.

pp.3-7 ante.

The advice of the Remembrancer of Legal Affairs was sought on the question whether under section 93(1)(a) of the Bombay Local Boards Act, 1923, the Administrator of the superseded District Local Board, Nasik, was competent to apply to Government to levy in increased cess at the rate of two annas in the rupee.

2. In view of my previous opinion No.4632, dated the 21st May 1941, I advised that as under section 131(a) of the Bombay

pp.47-49 of File O.University/41.

Local Boards Act, 1923, during the period of supersession of the District Local Board, Nasik, the Administrator could exercise and perform all powers and duties of the Board, he was competent to apply to Government for the levy of cess at enhanced rate under section 93(1)(a) of the Act (Vide R.L.A's No.5175 dated 9-6-1941).

p.65 of O.Local Boards /41.

3. Since then the Advocate General has held that the person appointed as Administrator under section 219(2)(b) of the Bombay Municipal Boroughs Act,1925, is distinct and different from the Municipality which is superseded, and he cannot be said to be "the Municipality"; he may have the right to exercise all the powers and perform all the duties of the Municipality but he is still not and cannot be said to be " the Municipality" (vide Advocate General's opinion dated 15-7-1941). The opinion of the Advocate General relates to the question whether an Administrator appointed under section 219(2)(b) of the Bombay Municipal Boroughs Act, 1925, is a " local authority" within the meaning of the term in section 2(a) of the Bombay Town Planning Act, 1915, and that opinion does not seem to affect the competence of an Administrator in exercising the powers of the Board under section 93(1)(a) of the Bombay Local Boards Act.

Slip V below

4. The point however does not appear to be free from doubt. The Advocate General

is therefore requested to advise whether the Administrator of a superseded District Local Board is competent to exercise the powers of the District Local Board Under section 93(1)(a) of the Bombay Local Boards Act, 1923.

Id/-----

Remembrancer of Legal Affairs.

U.R.to the Adv. Genl. , Bombay, No.7363
dated the 21st August 1941.

DYR.

I agree with the view of the R.L.A. in paragraph 3 of his Note that my Opinion dated the 15th of July 1941 does not affect the present question.

2. Here, under section 131(a) of the Act, the Administrator is empowered, inter alia, to exercise all the powers and perform all the duties of the Board during the period of supercession. One of such powers or duties is that under section 93(1)(a) of making an application to levy an increased cess. He can, therefore, exercise that power or perform that duty. In the other case, the power, was contained in a separate Act, viz: the Town Planning Act, and was exercisable only by a local authority as defined in that separate Act. That definition, though it included a Municipality, did not include a person having under the Municipal Act the right to exercise the powers of the Municipality.

3. The Administrator, is, therefore, competent to exercise the powers of the Board under section 93(1)(a) of the Act

Id/ - - -

Advocate' General

14-9-41.

DYR.

The statement of the case along with the copy of the Advocate General's opinion dated the 14th September 1941 is sent herewith.

2. The Advocate General agrees with the view taken by the R.L.A.

Id/------ 23/9.

Remembrancer of Legal Affairs.

U.R.to G.D. No.8376 dated 24th September 1941.

D.S. (before issue)
A.L.R (" ")
S.A.S (" ")
A.S. (" ").

In view of the notes at pages 112-114 underlying Government Resolution, General Department No.2854 dated 22nd May 1902 at pages 123-124 of G.D. 1902 Vol. No.58 and the recital to the effect that proprietary rights in the building had been handed over to the District Local Board in Government Memorandum No.4601 dated 31st August 1904 printed in the preamble to Government Resolution, General Department No.462 dated 23rd January 1906, it is not understood why Government should now or in future desire to resile from the existing position and resume their former proprietary rights against the wishes of the District Local Board, Ratnagiri. In case such resumption be at the desire of or with the consent of the District Local Board, there will be no cause for apprehending any hitch in the retransfer. If, on the other hand, the proprietary rights are to be resumed by Government against the wishes of the District Local Board, it would at this stage be impossible(and probably also unwise) to speculate on the possible grounds that might be urged by the Board in support ot its claims against the contingent action of Government. The validity of the possible contentions of the Board may safely be left to be adjudicated when the contingency materialises and the grounds taken up by the District Local Board are know to Government.

Id/------

Remembrancer of Legal Affairs.

dated the 29th September 1941.

U.R.to G.D.No.8528, dated the 29th September 1941.

Section 126(1) of the Bombay Local Boards Act, 1923, empowers the Collector. in cases of emergency, to provide for the execution of certain work etc. and to direct that the expense of executing the work etc. shall be forthwith paid by the local boards. Normally the direction regarding the payment of the expense etc. by the local board should be issued by the Collector simultaneously with (or at any rate within a reasonable period thereafter but so as to form part of the same transaction as) the provision for the execution of the work etc. The two powers viz.(i) to provide for the execution of the work etc and (ii) to direct that the expense etc. shall be paid by the local board are not mutually independent so that they can be exercised separately on two different occasions. In this connection attention is invited to the Remembrancer of Legal Affairs' U.R. to G.D. No.6874, dated the 5th August 1941. As to whether the expense of the work etc. should be paid out of Government grants in the first instance and then recouped by adjustment or short payment there would appear to be no legal objection to this course provided the grant is discretionary and the rules relating to such grant permit such adjustment.

Id/---

Remembrancer of Legal Affairs.

U.R. to G.D.No. 10347, dated the 2nd December 1941.

The order of Government contained in Government Resolution, General Department, No.2314/33, dated the 19th March 1938, approving the proposal of the District Local Board, Kolaba, to change its headquarters from Alibag to Pen not having been notified as required by section 133(h) of the Bombay Local Boards Act, 1923, the change of its headquarters from Alibag to Pen would be deemed to have been done not in the pursuance of an order of Government under section 133(h) but in exercise of powers vested in the District Local Board as being incidental to its general powers of carrying out the purposes of the Act(see R.L.A's opinion no.3744, dated the 25th June 1935). In the absence of any order of Government passed and notified under section 133(h) fixing the headquarters of the District Local Board, Kolaba, it would be open to the Board to change its headquarters at any time if deemed necessary in the interest of its administration. The view expressed by the Commissionor in paragraph 2 of his endorsement at page 87 ante is correct.

Id/----- 23/6.

Remembrancer of Legal Affairs.

U.R. to G.D.No.5618, dated the 25th June 1941.

D.S. (Before issue)
A.L.R(" ")
S.A.S(" ")
A.S. (" ")

DYR.